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No. 88-435

In The

Supreme Court of the United States

October Term, 1988

MARIANNE B. GEEAR,

Petitioner,

v.

BOULDER COMMUNITY HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FEDERAL AND LOCAL RULES iii

INTRODUCTION 1

GROUNDS FOR OPPOSITION TO PETITION 1

I. THERE IS NO CONFLICT REQUIRING RESOLUTION AMONG THE FEDERAL COURTS OF APPEAL 1

A. Geear's Reliance on Griffith is Misplaced 1

B. None of the Other Cases Cited by Geear Establish That a Conflict Exists 3

C. Given the Proper Case, an Eleventh Circuit Holding on the Notice Issue Would Most Likely be Consistent with That of the Tenth Circuit 4

II. THERE SHOULD NOT BE CONFLICT BETWEEN THE ELEVENTH AND REMAINING CIRCUITS REGARDING THIS ISSUE ... 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973) 2

Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981) 2

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) 5

Brown v. Shinbaum, 828 F.2d 707 (11th Cir. 1987) 3

Coleman v. Smith, 828 F.2d 714 (11th Cir. 1987) 3

Crown Central Petroleum Corp. v. Waldman, 634 F.2d 127 (3d Cir. 1980) 3

Davis v. Bryan, 810 F.2d 42 (2d Cir. 1987) 3

Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) 2

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) 3

Garaux v. Pulley, 739 F.2d 437 (9th Cir. 1984) 2, 3

Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985) .. 1, 3

Herron v. Beck, 693 F.2d 125 (11th Cir. 1982) 4

Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) 4, 5

Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968) 2

Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) 6

Lary v. Ansari, 817 F.2d 1521 (11th Cir. 1987) 3

Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982) 2

Milburn v. United States, 734 F.2d 762 (11th Cir. 1984) 3, 4

Moore v. State of Florida, 703 F.2d 516 (11th Cir. 1983) 4, 5

TABLE OF AUTHORITIES–Continued

Page

Nichols v. United States, 796 F.2d 361 (10th Cir. 1986) 3

Prospero Asso. v. Burroughs Corp., 714 F.2d 1022 (10th Cir. 1983) 2

Smith's Estate v. Terrant County Hosp. Dist., 691 F.2d 207 (5th Cir. 1982) 3

Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985) 3

FEDERAL AND LOCAL RULES

Federal Rule of Civil Procedure 56 ..... 3, 4

Rules of the Supreme Court of the United States 17.1 1

INTRODUCTION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted where there are special and important reasons therefor." Sup. Ct. R. 17.1. One of the "special and important reasons" set forth in the Rule is the circumstance in which one federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Petitioner Geear, in hopes of satisfying the threshold criteria for review on writ of certiorari, has attempted to shape a conflict between the Eleventh and remaining federal courts of appeal concerning the manner of notice required to be given by the Court to the adverse party with respect to the type and timing of any response by the adverse party prior to the consideration of a motion for summary judgment by that court. Geear's Petition must fail because she has not established the existence of a conflict requiring resolution betweent the Eleventh and Tenth Circuits.

GROUNDS FOR OPPOSITION TO PETITION

I. THERE IS NO CONFLICT REQUIRING RESOLUTION AMONG THE FEDERAL COURTS OF APPEAL.

A. Geear's Reliance on Griffith is Misplaced.

Petitioner Geear's argument in support of her Petition for Writ of Certiorari is predominantly based upon Geear's reading of the Eleventh Circuit's decision in *Griffith v. Wainwright*, 772 F.2d 822 (11th Cir. 1985). Geear interprets the Eleventh Circuit to require actual notice to

a nonmoving party, at least ten days in advance, of the date upon which the court will take a motion for summary judgment under advisement. She contrasts that decision to that of the Tenth Circuit below which, following the lead of the Fifth Circuit, held that the constructive notice provided by a local rule of the court adequately affords notice to an adverse party.

However, a careful look at the facts of *Griffith* reveals that Geear's reliance upon *Griffith* as establishing a conflict is misplaced. *Griffith* was a pro se civil rights action, filed by a Florida state prisoner, in which the federal district court granted the defendants' Motion for Summary Judgment as an alternative to their F.R.Civ.P. 12(b)(6) Motion to Dismiss. The facts which clearly support the resolve of the court in *Griffith* that a 10-day advance notice should have been given are (1) a pro se litigant, and (2) a motion to dismiss converted, in the alternative, to a motion for summary judgment. There is agreement among all of the circuits that have had the opportunity to rule thereon that the presence of either of these facts requires actual notice to the adverse party. For the holding that special care must be exercised to ensure proper notice is given to a pro se litigant, *see Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979); *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982); and *Garaux v. Pulley*, 739 F.2d 437 (9th Cir. 1984). For the holding that a motion to dismiss, when converted to a motion for summary judgment, pursuant to F.R.Civ.P. 12(b) requires actual notice, *see Adams v. Campbell County School District*, 483 F.2d 1351 (10th Cir. 1973); *Prospero Associates v. Burroughs Corp.*, 714 F.2d 1022

(10th Cir. 1983); *Nichols v. United States*, 796 F.2d 361 (10th Cir. 1986); *Garaux, supra; Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987); *Smith's Estate v. Tarrant County Hosp. Dist.*, 691 F.2d 207 (5th Cir. 1982); and *Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127 (3d Cir. 1980). *Griffith* does not address how the Eleventh Circuit would rule in a case involving a litigant represented by counsel and a motion for summary judgment filed pursuant to F.R. Civ. P. 56, as expanded by applicable local rules of the federal district court. Thus, the *Griffith* case does not establish that a conflict exists between the Eleventh and Tenth Circuit federal courts of appeal.

B. None of the Other Cases Cited by Geear Establish that a Conflict Exists.

As the Eleventh Circuit stated in *Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984), "earlier cases enforcing the 10-day notice requirement involved fact patterns different from that before us," e.g., pro se litigants, no opportunity for response, no motion for summary judgment filed.[1] All of the other cases cited by Geear, subsequent to the *Griffith* case, contain either a pro se litigant or a converted motion to dismiss. *Lary v. Ansari*, 817 F.2d

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[1] *Milburn*, while involving plaintiffs who were represented by counsel, also involved circumstances under which a motion to dismiss was converted to a motion for summary judgment. The Eleventh Circuit was asked to rule that the local rule of the lower court had provided adequate notice. However, the Eleventh Circuit found the record so uncertain with respect to the lower court's actions and reasoning that it would not consider the local rule question.

1521 (11th Cir. 1987) (motion to dismiss converted to motion for summary judgment); *Brown v. Shinbaum*, 828 F.2d 707 (11th Cir. 1987) (pro se litigant); *Coleman v. Smith*, 828 F.2d 714 (11th Cir. 1987) (pro se litigant); *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (motion to dismiss converted into motion for summary judgment). Thus, these cases cannot establish that a conflict exists between the Eleventh and Tenth Circuits.

C. Given the Proper Case, an Eleventh Circuit Holding on the Notice Issue Would Most Likely be Consistent with that of the Tenth Circuit.

It is quite clear that the Eleventh Circuit has never been presented with a proper case, i.e., a party represented by counsel and served with a motion for summary judgment pursuant to F.R.Civ.P. 56, in which to decide if constructive notice pursuant to a local rule of the lower court would be sufficient notice to an adverse party. One Eleventh Circuit case that provides some insight into the Eleventh Circuit's potential stance in a proper case is *Moore v. State of Florida*, 703 F.2d 576 (11th Cir. 1983). Although this case was brought by a pro se prisoner, the Eleventh Circuit Court of Appeals provides illuminating discussion of its notice requirement. The court states:

> Generally, "the 10-day notice requirement of rule 56(c) is strictly enforced." *Herron v. Beck*, 693 F.2d 125, 126 (11th Cir. 1982). However, a recent panel of the former Fifth Circuit adopted what might be referred to as a "constructive notice" theory of Rule 56. In *Howell v. Tanner* (cite omitted), the appellant attacked the granting of a summary judgment against him on the ground that he had not been notified of the date upon which a decision on the motion would be forthcoming. The court affirmed the judgment, however, on the basis of a local rule "which defined a 10-day

> period within which all materials must be filed in order to receive consideration from the court." *Id.* at 614 . . . In this case, the defendants point out that Local Rule 3.01 of the United States District Court for the Middle District of Florida is analogous to the local notice rule at issue in *Howell*. . . . Thus, defendants argue, relying upon *Howell*, that the local rule was sufficient to put Moore on notice that the summary judgment would be taken under advisement within ten days. We disagree, finding the *Howell* case distinguishable because it did not involve a pro se litigant. Pro se inmates, with limited access to legal materials, occupy a position significantly different from that occupied by litigants represented by counsel . . .

Id. at 519-20.

Despite the Eleventh Circuit's stance that a ten-day advance notice is to be enforced for all litigants, it can be argued from the above discussion that the court would at least consider the proposition that notice provided by a local rule of court is sufficient in a proper case. However, whether or not *Moore* demonstrates a willingness on the Eleventh Circuit's part to consider notice by local rule sufficient, the proper case has not as of yet been presented, and it would be premature on the part of this Court to resolve a conflict which it cannot, with assurance, determine even exists.

II. THERE SHOULD NOT BE CONFLICT BETWEEN THE ELEVENTH AND REMAINING CIRCUITS REGARDING THIS ISSUE.

The district courts that comprise what is now the Eleventh Circuit were previously part of the Fifth Circuit. In 1981, the Fifth Circuit's territory was divided, resulting in the addition of the Eleventh Circuit Court of Appeals to the federal court system. The new Eleventh

Circuit adopted as binding precedent all decisions of the Fifth Circuit Court of Appeals announced prior to October 1, 1981. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The key Fifth Circuit case on the issue of notice to an adverse party upon the filing of a motion for summary judgment is *Kibort v. Hampton,* 538 F.2d 90 (5th Cir. 1976). The Court's position is clear:

> What the rule contemplates is ten days advance notice to the adverse party that the matters will be heard and taken under advisement as of a certain day. This provides the adverse party with the opportunity to prepare materials for the Court to consider when ruling on the motion. If the adverse party is given this opportunity, then he has been heard within the meaning of Rule 56.

Id. at 91.

* * *

> Procedures provided by local rule in some districts requiring motions for summary judgment to be accompanied by briefs and requiring opposing affidavits and briefs to be filed within a period not less than 10 days after which the Court will consider the Motion submitted for decision would appear to afford adequate hearing within the meaning of Rule 56.

Id. at page 91, n. 1.

Since *Kibort* was announced prior to October 1981, the Fifth Circuit's position should be the Eleventh Circuit's position under the proper set of factual circumstances. There should be no conflict between the Eleventh and Tenth Circuits on this issue.

CONCLUSION

The granting of a petition for writ of certiorari is a discretionary decision to be made by this Court when special and important issues are presented for review. Petitioner has failed to establish that any such special or important reason for review exists at this time. A conflict between the federal courts of appeal cannot be resolved until the conflict is sufficiently definitive to require resolution. Since none of the Eleventh Circuit cases cited by Petitioner raise the notice question in a fact pattern remotely similar to Petitioner's circumstances, it would be presumptive to assume that the Eleventh Circuit would decide differently than the other federal courts of appeal on the notice issue. Petitioner's Petition for Writ of Certiorari should be denied.

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